

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT NASHVILLE

Assigned on Briefs October 7, 2008

**STATE OF TENNESSEE v. THOMAS EDWARD CLARDY**

**Appeal from the Criminal Court for Davidson County**  
**No. 2006-D-1065     Seth Norman, Judge**

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**No. M2007-02729-CCA-R3-CD - Filed February 2, 2009**

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The defendant, Thomas Edward Clardy, appeals from his Davidson County Criminal Court jury convictions of one count of first degree premeditated murder, two counts of attempted first degree premeditated murder, and three counts of reckless endangerment. He claims that the evidence was legally insufficient to support his convictions, emphasizing that the State failed to meet its burden of proof in establishing the defendant's identity as the perpetrator. The defendant also claims that the trial court erred in not granting his motion for a judgment of acquittal. Because the evidence presented was legally sufficient to support the convictions, we affirm the judgments of the trial court.

**Tenn. R. App. P. 3; Judgments of the Criminal Court Affirmed**

JAMES CURWOOD WITT, JR., J., delivered the opinion of the court, in which D. KELLY THOMAS, JR., and CAMILLE R. McMULLEN, JJ., joined.

Patricia L. Snyder, Nashville, Tennessee, for the appellant, Thomas Edward Clardy.

Robert E. Cooper, Jr., Attorney General and Reporter; Matthew Bryant Haskell, Assistant Attorney General; Victor S. Johnson III, District Attorney General; and Dan Hamm and Sharon Reddick, Assistant District Attorneys General, for the appellee, State of Tennessee.

**OPINION**

On July 29, 2005, Kirk Clouatre (Kirk)<sup>1</sup> was working with his brother Kent Clouatre (Kent) at Kent's automobile body shop on Brawner Avenue in Madison, Tennessee. Kirk's wife, Melissa Clouatre (Melissa) was also present with the couple's two children, Elizabeth and Ashley Clouatre, and Ashley's friend Amanda Terlep. A vehicle pulled up to the body shop, and a group of men exited the vehicle. After a short conversation between some of the men and Kirk, one man pulled a gun and fired, killing Kirk and wounding Melissa. Another man shot and wounded Kent.

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<sup>1</sup> Although it is the custom of this court to refer to people by their surnames, in this instance four of the victims share the surname "Clouatre." For purposes of clarity, this opinion will refer to each victim by his or her first name.

The men then retreated to their vehicle and fled the scene. The Metropolitan Davidson County Police (Metro Police) interviewed Kent and Melissa. Kent identified the defendant from a photographic lineup.

In April 2006, a Davidson County grand jury indicted the defendant on six counts. Count I alleged that the defendant intentionally and with premeditation killed Kirk in violation of Tennessee Code Annotated section 39-13-202. Count II alleged that the defendant attempted to intentionally and with premeditation kill Kent, and Count III alleged that the defendant attempted to intentionally and with premeditation kill Melissa. Counts IV through VI alleged that the defendant recklessly engaged in conduct which placed or might have placed Ashley, Elizabeth, and Amanda Terlep in danger of death or serious bodily injury in violation of Tennessee Code Annotated section 39-13-103. After a three-day trial, the jury returned verdicts of guilty on all counts. Because the State did not seek an enhanced penalty on the first degree murder charge, by operation of law the defendant was sentenced to life imprisonment for that conviction. *See* T.C.A. § 39-13-208(c) (2003). The trial court sentenced the defendant to 15 years' imprisonment as a Range I offender on Counts II and III and two years' imprisonment as a Range II offender on Counts IV through VI. The trial court ordered the sentences for Counts II through VI to run concurrently with each other and with the defendant's life sentence.

The defendant's motion for judgment of acquittal or in the alternative for new trial was denied on November 2, 2007, and the defendant filed a timely notice of appeal on November 29, 2007. The defendant challenges the sufficiency of the evidence as legally insufficient to support his convictions, and he claims that the trial court erred in denying his motion for judgment of acquittal.

At trial, Melissa testified that she had dated Kirk since 1991, that they were married in 2000, and that they had two children together, Elizabeth and Ashley. She stated that in the summer of 2005, she worked at Am South Bank and Kirk worked as a mechanic at his brother's body shop on Brawner Avenue. Kent operated the body shop, and Kirk had worked with him for the two years leading up to his murder. She testified that he worked "long hours" five to six days a week.

She testified that in 2005, she drove a 1996 Lincoln Towncar and that she also owned a "black on black '85 Monte Carlo" that Kirk had bought for her "some time ago." Melissa testified that she did not drive the Monte Carlo in 2005 and that they kept the car at the body shop in storage. She testified that she thought Kirk wanted to sell the Monte Carlo because they could use "extra cash" for "the house and stuff."

Melissa testified that, in the weeks prior to her husband's murder, Kirk "didn't go to work for two weeks, we had a two[-]story house, so he stayed down stairs and he stayed on the couch for almost two weeks solid." She said, "He wouldn't get up, and he would eat, and that was about it." She testified that his behavior was unusual and that he never explained why he acted so

peculiarly. She testified that on July 28, 2005, the Thursday before he was murdered, Kirk finally left the house to go out to eat with her and “the girls.”

Melissa testified that she never knew much about her husband’s business associations or his friends. She stated, “[Kirk] told me that was not, that was . . . his business and my business was staying home with my girls. That was my priority.” She testified that, if she asked her husband about things “going on in his life,” he would respond, “Don’t worry about it.”

Melissa testified that on July 29, 2005, “[w]hen I had got up to get ready for work [Kirk] was already dressed and said, on your way to work drop me off at the shop, I need to get some work done. And I’m like, okay, you haven’t been going for two weeks, are you sure? He said, yes, I need to get out.” She stated that she got home from work at approximately 7:00 or 7:30 p.m. because she “had to pick up [her] girls from [her] parent’s house.” Her daughter Ashley had a friend with her named Amanda. She testified that Kirk “called about 9:30 or 10:00 o’clock that night” to ask her to pick him up from the body shop.

According to her testimony, Melissa arrived at the body shop with her two daughters and Ashley in the car shortly after Kirk called. She said, “We go in, we pull up and [Kirk] heard a noise on my car, I think it was the right passenger side and he wanted to look at it.” She stated that her husband pulled the car into the right side of the garage and that her Monte Carlo was parked on the left side of the garage. She left the vehicle and stood by a toolbox in the garage so that her husband could pull her Town Car into the garage. The children stayed in the car, and she testified, “Kirk told them to stay in the car that he wouldn’t be long, daddy would be not long at all.” She stated that Kirk “was going to jack the car up.”

Melissa stated, “A car pulls up. I can tell it was either a dark or a green, but it was an oval back, I couldn’t tell if it was a Taurus or a Sable.” She testified that three men got out of the vehicle and that she did not recognize any of the three men. She stated, “They got out and Kirk walked over and they all come in, I think three of them or two of them came in the shop with Kirk and Kent and they were standing behind my Monte Carlo.” She stated that she did not remember where Kent was initially, but after the men arrived, Kent “was coming towards Kirk at the front of the shop.” She remembered that after the car first pulled up, Kirk stated to Kent, “[W]here is your gun?” She stated, “In a way it scared me,” but Kirk always carried some kind of gun in his “back britches.” Melissa testified that she could not hear the conversation between the Cloutre brothers and the men, but she “thought they were looking at the [Monte Carlo] to buy it.”

Melissa stated that Kirk had left the conversation to return to her Lincoln Town Car and that he “was jacking up [her] car at the time of the shooting.” She said, “Kirk walks back over to the car to start back jacking it up and I heard Kent holler, Kirk, no.” She then heard gunfire and she “got down.” She stated that she heard about “four to five gun shots” and that “Kirk fell in front of the car and started kicking and jerking.”

Melissa stated, "The shooter was . . . right in front of my youngest sitting in the front seat." She did not believe that the shooter knew that she was in the garage at that time. She said, "When I stood up I thought he was gone, I guess I started him and he . . . shot me and I was standing at a slant. And if I was standing straight up I'd died." She testified that the shooter faced her direction and looked at her "[j]ust long enough to shoot [her] and then turn[ed] around and ran," and therefore she did not have a long time to look at her assailant. She testified that the shooter was approximately 30 feet away from her and that a support pole in the center of the garage obstructed her view. She had never seen the shooter before that night. Melissa stated that she also saw a man in a blue shirt "standing there looking at my girls the whole time," and he did not appear to have a gun.

Melissa stated that after the shooting she "got up and made sure that [her] girls w[ere] okay and [she] didn't want them to see their daddy there laying [sic] in blood." By the time she could stand up, the men had left in their vehicle. She backed the Lincoln Town Car out to the road and ran into the garage and found Kent holding Kirk and "holler[ing]" that "[his] brother [was] dead." Melissa testified, "I said, Kent, I got to get some help and I went and called 911."

She stated that she went to the back office to call 9-1-1 for five to ten minutes and that she did not see any drugs in the back office. She testified that she had never seen drugs in the back office before. Melissa also stated that, until she was on the phone with 9-1-1, she did not know that she had been shot. While she was on the phone, the police and paramedics arrived and took her to the hospital on a stretcher. She testified that she did not remember giving the police any statements before going to the hospital.

Melissa stated, "The bullet went through my chest and went through my colon and I almost had to have a colostomy." At the hospital, she had to go through surgery, and she received 160 stitches. She had to stay at the hospital for one week. After leaving the hospital, she met with law enforcement officers and gave them "the best information that [she] could give them." The officers showed her photographic lineups; however, she was unable to identify the shooter.

On cross-examination, Melissa clarified that the man that shot her was the same man that shot her husband. Defense counsel asked her about descriptions of the assailants that she gave to Detective Cynthia Quirouette on July 31, 2005. She responded, "July 31st I wasn't even awake to talk. . . . I didn't wake up until that next Sunday." Melissa testified that she had no memory of describing any of the men as "roly poly," but she "said he was probably 5'7", weighed 150 pounds and in his late 20's." When defense counsel continued to ask her about descriptions that she reportedly gave to Detective Quirouette, she explained "I must have been under some -- I do not remember saying those." She also stated, "[T]he one I saw had a white t-shirt" and a "long silver gun."

Melissa agreed that the other man she saw "was male black, tall, 6'2" not chunky, blue thing on head," and she stated that she "[did] not recall seeing the other ones because they did not come into the shop."

She also testified that she did not recall telling Detective Jason Proctor that Kent and Kirk sold marijuana and cocaine out of the body shop. She said, "He might have been selling marijuana, but I don't have no idea about cocaine." She testified that she did not know where Kirk usually kept marijuana. Melissa admitted on cross-examination that she flushed marijuana down the toilet at Kent's request on the night of the shooting. She maintained that she only disposed of marijuana and did not see any other drug.

Kent testified that in 2005 he operated the business "Color Concepts" at 214 Brawner Avenue. He stated that he was Kirk's twin brother and that Kirk "brought his tire machine in and balancer and he did mechanic work, computer work, stuff like that." Kent testified that on July 29, 2005, he and Kirk had worked at the garage for nine or ten hours. He stated that he remembered that Melissa came some time after 10:00 p.m. because he usually watches the television news at 10:00. After they arrived, Kirk pulled the Lincoln Town Car into the garage because "he wanted to grease the ball joint or something that was up in there." He remembered that Melissa exited the vehicle but that the children did not because Kirk would only take "a second."

Kent testified that he was picking up trash around the garage and the area outside when "three individuals pulled up in a car out there on the street." He described the men as African-American. He stated, "And then at this time I believe [Kirk] had his black Monte Carlo that I painted back in '99, late '99 for sale. He had told me earlier that evening that three, that somebody was coming to look at it." Kent said that, at first, he did not recognize the men, and "[t]hey had pulled up on the street, they had rolled down the window and asked if that car was still in there." Kent testified that he then "hollered" at Kirk, who was working on the Lincoln Town Car at the time. He explained,

The car pulled up in front of the small door because the big door was closed and . . . I glanced over my shoulder and about the time that I noticed that that individual got out of the car and went straight into the shop.

. . . .

When he approached into the building there was a second guy got out of the passenger front, a taller man and he was right behind him. The third gentleman either got out kind of slow, I'd say probably been 30 seconds lapsed and then I had looked in the shop and that's when I seen the side of his face and then all of a sudden, gun shots.

Kent testified that after the men arrived, but before the shooting, he recognized the driver of the vehicle as somebody that Kirk knew. Although he did not know his name at the time, Kent knew him as "T." He explained that Kirk knew him, "I mean, as far as him going up and down the road,

I'd say yes, they met each other there a couple of times." Kent testified that he knew that "T" had a burgundy Monte Carlo and that he had spoken with him about a black paint job for it at one point.

Kent stated that "T" was not driving his Monte Carlo on July 29, 2005, but he drove a "forest green Taurus." He stated that, after the men arrived, Kirk and "T" had a conversation, but he could not hear what they said. He testified that "T" shot his brother and that another man shot Kent. Kent remembered yelling "no" or "something to that effect" when he "got pulled on."

Kent stated that the defendant's gun was a "[s]emiautomatic .40 caliber." Kent testified that the two other men in the body shop were also armed. He testified one man had an "automatic weapon" but never fired it. He stated that "[t]he gentleman that fired upon me had a .38 caliber with a hammer on it, older model." He described the man that shot him as "a little bit heavy set . . . little shorter." Kent stated that he "had gold . . . in his teeth, diamonds were set sideways, when he gritted at [him]." He stated that, of the three men in the garage, he only recognized "T."

Kent was shot in the arm and through the back while he was outside the garage. He hid behind a telephone pole until the incident ended. He said the whole episode, from the vehicle arriving until it left after the shooting, lasted approximately three minutes. He saw the men re-enter the vehicle and drive southbound and turn left on Hickory Street. He called two friends and his fiancé "trying . . . to find out if somebody was in the area that could catch these individuals." He then went inside the garage to find that his brother and sister-in-law had been shot as well. Kent testified that his brother died before law enforcement personnel arrived at the scene. Kent testified that, when police arrived at the scene, he told them "it was a guy named T." He was then taken to the hospital, where he underwent three different surgeries and remained hospitalized for 21 days.

On August 23, 2005, Kent spoke with Detective Danny Satterfield of the Metro Police. He was shown a photographic lineup, and he was able to identify the defendant as "T." He testified that when he selected the defendant's picture, he stated, "This is the person that was driving the car and went into the shop and shot and killed my brother." Kent also identified the defendant in court, stating that "he tried to hide his identity by wearing a hood, running in the shop really quick. But when the two shots went off, he turned to the side and I seen the side of his face." Kent testified that there was "[n]o doubt in [his] mind" that the defendant, or "T," was the shooter that killed his brother.

On cross-examination, defense counsel asked Kent whether he remembered describing the assailants' vehicle as a "'87 Buick Sentry" and he responded "[a]s far as I recall, it was a Taurus." He stated that the defendant had been in the body shop before, stating "[h]e's never been ten feet inside that building, but no further." Kent stated that all three men wore hooded sweatshirts. He also acknowledged that he had seen the defendant drive two or three different vehicles.

Kent agreed that on July 30, 2005, he stated that "the shooter is T" to Detective Quirouette. Defense counsel asked if he had ever stated that the killer was "D," and he responded,

“No, what I’m stating is, I was saying ‘T’ over and over and over.” He stated that on August 20, 2005, he met with Detective Satterfield and Sergeant Detective John Batty, and he gave descriptions of the three shooters. He stated that the back seat passenger was “[m]ale black, 25 to 29 years old” and “[f]ive foot six inches, 200 pounds, gold teeth, camel[-]skin jacket, baggy blue jeans, dark colored ball cap, gold necklaces.” When defense counsel asked if he remembered describing “T” as “five foot six inches, 170 pounds, hair in small braids, tattoos,” Kent stated that he could not remember ever stating that “T” had tattoos.

The State next called Officer Bridget Ann Griepentrop of the Metro Police, who testified that she was the first officer on the crime scene at Brawner Avenue on July 29, 2005. She first saw Kirk lying on the ground and Kent kneeling “under” him. She testified that a child approached her “begging [her] to help the people inside.” She testified that Kirk was dead upon her arrival. She stated that Kent was difficult to understand because he was having an “extremely hard time breathing” and that she “didn’t think [Kent] was going to make it.” She said, “I was focused on trying to get initial interviews from Melissa and Kent before they were transported to the hospital to see if I can get any suspect description and to put out that information.” Officer Griepentrop testified that Kent’s and Melissa’s physical conditions were “[v]ery poor” and that “they were talking really low, really hard time breathing, huffing, like I didn’t know how much more they would be able to speak.”

She stated that, when she initially arrived, Kent told her that the shooters were gone and that they drove a blue Buick. Officer Griepentrop testified that Melissa told her the shooter “was a male black, approximately 5’8[“], 140 [pounds] with white shirt and a[n] . . . afro.” Melissa also told her “four male blacks had come in trying to buy a car and they started shooting.”

On cross-examination, Officer Griepentrop agreed that Melissa told her that “four black men stopped in a blue car.” She also clarified that Kent described a 1987 Buick SENTRY. Officer Griepentrop testified that, had Kent given a description of any suspect she would have included such information in her report; however, she never received any description.

Roselle Wester testified that he was a friend of both Kent and Kirk. He stated that he was at the body shop at approximately 9:00 p.m. on July 29, 2005, and he left around 10:00 p.m. He stated that he was familiar with “T,” but he did not know his real name as of July 29. He identified the defendant as “T” in the courtroom. Mr. Wester testified that he knew the defendant “[j]ust from around the neighborhood” and that he had “seen him over by the shop a few times” when Mr. Wester was with Kirk. He testified that he had seen the defendant driving a “green Taurus or Sable . . . [a] few times, whenever [he had] seen him.”

Mr. Wester testified that Kirk and the defendant “[d]idn’t get along,” and the two had several “[c]onfrontations” and “arguments.” He testified that the disputes never “got out of control,” but at one point two weeks before Kirk’s murder, Kirk told the defendant to leave the shop and never return. Mr. Wester stated that he did not recall Kirk and the defendant ever discussing Melissa’s black Monte Carlo.

Mr. Wester received a call from Quinton, a friend of Kent, on the night of July 29, 2005, and as a result of that call he went to the body shop and spoke with law enforcement officers. He testified that he was cooperative with the Metro Police and helped them identify who "T" might be and what he drove. On cross-examination, Mr. Wester stated that on the night of July 29 he drove a gray 1998 Buick.

Jason Proctor, Detective Sergeant with the Metro Police, testified that he was the first detective to respond to the scene. By the time Detective Proctor arrived at the scene, Melissa and Kent had been transported to the hospital. After visiting the body shop at Brawner Avenue, he interviewed Melissa at the hospital. Although she "was pretty upset," Detective Proctor stated that she "seemed to be very coherent and responded well to the questions." He testified that Melissa described a suspect "as being a male black, approximately 5'7", 170 pounds" and that "he was in his late 20's or early 30's and had frizzy hair and a white t-shirt." Detective Proctor testified that the defendant's arrest report stated that he was 5 foot 8 inches, and 170 pounds at the time of arrest. On cross-examination, Detective Proctor agreed that his report reflected that Melissa described a "90's four-door blue car, possibly a Taurus." He testified that he did not see any mention of the defendant's having tattoos.

Warren Fleak from Metro Police's crime scene investigating unit testified that he collected evidence from the scene. He received a call from the Brawner Street location at approximately 12:10 a.m. on July 30, 2005. He testified that he found "live rounds," "spent casings," and "projectile fragments" on the floor of the garage. He identified that at least one round came from a "Winchester .9 mm Ruger." On cross-examination, he testified that the defendant's fingerprints were not found on any of the rounds or anywhere else at the scene.

Metro Police Detective Danny Satterfield testified that he became involved in the case in August of 2005. On August 20, he spoke with Kent after he was released from the hospital. He stated that Kent had given them the name "T," and he showed Kent a photographic lineup to identify "T." Detective Satterfield testified that Kent identified the defendant and stated "that is the person that was driving the car that went into the shop and shot and killed my brother." He also testified that a gun was found underneath the body of the victim; however, Metro Police found no weapon at the crime scene that was believed to belong to any of the assailants.

On cross-examination, Detective Satterfield agreed that during his August 20, 2005 interview with Kent, Kent said that the defendant drove up in "a bluish gray '84, '86 model Buick with six square taillights" and that "T" had tattoos. He also stated that, on August 24, 2005, Melissa described the shooter's car as a blue teal vehicle "similar to a Taurus or Sable." He also testified that the defendant once received a speeding ticket in a maroon Monte Carlo in 2005; however, he testified that the Monte Carlo was not registered in the defendant's name.

Detective Jason Batty testified that, at the beginning stages of the investigation, Kent was not forthcoming with information because he thought the Metro Police would charge him with



drug-related crimes. Detective Batty was present for the photographic lineup when Kent identified the defendant, and he searched for the defendant to arrest him.

Detective Batty testified that Rolesha Mason, the defendant's girlfriend who later testified that she was the defendant's wife, lived at the defendant's only known address. He testified that she was hostile to the police and not cooperative about the whereabouts of the defendant. He further testified that he saw a "teal green" 1996 Mercury Sable parked outside the defendant's apartment. He stated that the car matched the description of a car frequently driven by the defendant. On cross-examination, he admitted that he never saw the car in operation. Detective Batty testified that the defendant turned himself in to custody on January 15, 2006, and that he was "at large" for approximately four months.

Doctor Staci Turner, Assistant Medical Examiner for Davidson County, performed the autopsy on Kirk. Doctor Turner testified that "[Kirk's] main injuries were multiple gunshot wounds. . . . He had two gunshot wounds of his torso, one of his left hand and wrist and one of his left leg." She testified that "at least three" shots hit Kirk. She testified that one shot "entered the left arm pit and it went through the back and into the muscle and did not enter the chest cavity." She recovered that bullet from the left side of his back. Doctor Turner stated that another bullet entered "right below the nipple on the right side. And that went through his right lung, through his heart, . . . through his trachea and esophagus, through his left lung and into the left side of his back where [she] recovered another bullet." She testified that she found two other bullet wounds, one wound entered the back of his left hand and came out the front of his left wrist, and the other entered the inside of his left thigh and came out by his left knee on the side. She said, "The gunshot that would have been immediately or very quickly fatal is gunshot wound number two, which is the one that entered the right chest and went through many vital organs and ended up in the left side of the back."

Doctor Turner testified that Kirk's injuries were consistent with a shooter standing approximately "a car width" distance away and shooting at the victim from the side. She testified that the cause of death was multiple gunshot wounds and that the manner of death was homicide. After Doctor Turner's testimony, the State rested.

The defendant first called Metro Police Officer Cynthia Quirouette.<sup>2</sup> She testified that she interviewed Kent on July 30, 2005. Because Kent could not speak due to a tracheotomy, he wrote his answers. She stated that Kent wrote "somebody that might know the guy T" and he wrote that "[T] was there." She said, "Throughout the interview, at one point he said that one of the guys in the front seat of the Buick was T and at another point in the interview he said he did not see T." She also stated that Kent described the vehicle that the shooters drove as a 1984 or 1986 Buick Sentry or Celebrity that was "silver and gun metal gray."

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<sup>2</sup>The record indicates that Officer Quirouette served as a detective with Metro Police in 2005; however, at the time of trial she no longer served in the capacity of a detective.

Officer Quirouette testified that she again interviewed Kent on August 4, 2005. She testified that Kent “described T as 5'4" to 5'5", 150 to 200 pounds, between 28 to 30 years old with permed greasy hair, a short flattened out nose and crooked top front teeth.” Kent stated to her that he told his friend Quinton that “T” shot him.

Officer Quirouette also interviewed Melissa on July 31, 2005. She testified that Melissa described one suspect as “a roly poly short guy” and another suspect as “a male black, 5'7", 240 to 260 pounds, with black hair, wearing a buckskin top, . . . he sat in the back seat.” Melissa described another suspect as “male black, 5'9" to 5'10", 160 to 180 pounds with gold teeth that may have been a fake partial.” Officer Quirouette testified that Melissa later made other descriptions, stating that “[o]ne was male black, 5'6" to 5'7", 170 pounds with fluffy hair and a gray and white t-shirt” and that the other suspect was “[t]all, possibly 6'2", skinny, possibly 190 pounds, wearing a blue thing on his head and possibly a black shirt.”

Officer Quirouette testified that, during an August 10, 2005 interview with Melissa, she “said she heard [Kirk] talking about a guy named B, and that he was talking about marijuana when she heard the name.” She testified that Melissa again described the person who shot her as “[w]earing a white shirt and afro.” Officer Quirouette also stated that Melissa at times said the shooter may have worn white on his head.

On cross-examination, Officer Quirouette stated that she interviewed a man named Quinton, who was deceased at the time of trial, and that he stated that Kent had told him that “T” shot his brother. She acknowledged that “before the police even got there the letter T had been bannered [sic] around by the surviving Mr. Cloutre to another person.” She also testified, “[Kent] says on the interview on . . . August 4th, that he thinks T shot them because Kirk owed him something.” On July 30, 2005, she asked Kent “why the shooting happened,” and he responded “Kirk made T jealous.” She admitted that such statements “definitely indicated that T was probably involved.” She also remembered “Kent said at one point that T owns a burgundy Monte Carlo, Kirk owns a black Monte Carlo and that [Kirk’s] car was better than T’s and T was jealous over the car.” Officer Quirouette stated that her reports reflected that Kirk was selling his Monte Carlo for \$10,000 and that the defendant did not have the money to buy it. She also noted that, during one of Kent’s interviews he maintained that he did not actually see the defendant, but he heard one of the men say “let’s go T, let’s go”; however, in the other interviews, Kent stated that he saw the defendant.

The defense next called Rolesha Clardy, formerly Rolesha Mason, who had been married to the defendant since June 28, 2004. She testified that in late July 2005, she “was at the last trimester of [her] pregnancy” and that she had “been having complications with [her] pregnancy and [her] doctor ordered [her] to bedrest.” She stated that the defendant had taken time off from work to stay home with her. She testified that on July 27, 2005, the defendant had taken her to the hospital; however, she was sent back home “because [her] contractions weren’t strong enough.” She stated that the two returned from the hospital in the early morning hours of July 28, 2005.

Ms. Clardy stated that she stayed in bed for most of July 29 and that if she needed to get out of bed for anything, the defendant was present to assist her. She stated that evening her friend Shakisha Thompson came to pick up her son, Marcellus, at 7:30 or 8:00 p.m. to take him bowling. She stated that when Ms. Thompson returned at 11:00 or 11:30 p.m., the defendant answered the door.

Ms. Clardy stated that she and the defendant owned two vehicles, a gold 2004 Dodge Stratus and a green 1996 Mercury Sable. She stated that the “head gasket [was] blown” on the Sable and that “it was undriveable” as of May 2005. She stated that the defendant had, at times, driven his cousin’s Monte Carlo but that she had not seen him drive it since 2003. She also stated that the defendant had no tattoos and no gold teeth.

On cross-examination, Ms. Clardy admitted that she did not actually see Ms. Thompson bring her son home. She stated, “[Ms. Thompson] called me when she got outside and I sent [the defendant] to the door.” She also testified that she did not tell the Metro Police where her husband was when they visited her to gather information because she did not know. She agreed that “it wasn’t uncommon” for her to not know the defendant’s whereabouts.

Lastly, the defense called Shakisha Thompson, who testified that she was Marcellus’s godmother and that she picked him up to go bowling around 7:30 or 7:45 p.m. on July 29, 2005. She stated that she took Marcellus back home at 10:30 or 11:00 p.m. and that the defendant met her at the door. She said, “He was normal, how he sees me every other day, he spoke. He was just calm. I asked him how Rolesha was doing he told me, he told me thanks for taking out Marcellus.” She said that the defendant was wearing a shirt, shorts, and “grandpa slippers” and that “he looked nice.”

Ms. Thompson stated that she had known Rolesha Clardy since 1999 and the defendant since 2003. She testified that she knew the defendant to drive the green Sable, but after it broke down he drove the Dodge Stratus.

The defendant chose not to testify, and the defense rested. Based on the evidence as summarized above, the jury returned verdicts of guilty on all counts. The defendant filed a timely appeal and challenges his verdicts on the grounds that the trial court erred in not granting him a judgment of acquittal and that the evidence was not legally sufficient. The defendant’s argument of insufficient evidence largely revolves around his contention that the State failed to prove that the shooter was, in fact, the defendant. The defendant also mentions in his brief that “[a]t no time during the State’s case was any evidence presented supporting proof of premeditation.” Aside from the issues of identity and premeditation, the defendant does not challenge any other elements of his convictions.

### *I. Sufficiency of the Evidence*

The defendant claims that the trial court erred by denying his motion for judgment of acquittal because the evidence was insufficient to sustain the conviction. The defendant made two

motions for judgment of acquittal, one at the close of the State's proof and another with his motion for new trial. Rule 29 of the Tennessee Rules of Criminal Procedure provides, in relevant part, as follows:

The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses.

Tenn. R. Crim. P. 29(a).

This rule empowers the trial judge to direct a judgment of acquittal when the evidence is insufficient to warrant a conviction either at the time the State rests or at the conclusion of all the evidence. *See generally Overturf v. State*, 571 S.W.2d 837 (Tenn. 1978). At the point the motion is made, the trial court must favor the opponent of the motion with the strongest legitimate view of the evidence, including all reasonable inferences, and discard any countervailing evidence. *Hill v. State*, 470 S.W.2d 853, 858 (Tenn. Crim. App. 1971).

As for the defendant's first motion, we note that the defendant chose to offer proof following the trial court's denial of this motion for a judgment of acquittal at the close of the State's proof. As such, he has waived his right to appeal the denial of this motion. *See Finch v. State*, 226 S.W.3d 307, 317 (Tenn. 2007) (declining to revisit the waiver rule promulgated in *State v. Mathis*, 590 S.W.2d 449, 453 (Tenn. 1979)); *see also State v. Johnson*, 762 S.W.2d 110, 121 (Tenn. 1988); *State v. Ball*, 973 S.W.2d 288, 292 (Tenn. Crim. App. 1998). However, the defendant's second motion for judgment of acquittal was made at the close of all proof, and, accordingly, our review of the sufficiency of the evidence is not based solely on the evidence offered during the State's case-in-chief but must also necessarily include the proof offered by the defendant.

The standard by which the trial court determines a motion for judgment of acquittal is, in essence, the same standard which applies on appeal in determining the sufficiency of the evidence after a conviction. *Ball*, 973 S.W.2d at 292; *State v. Anderson*, 880 S.W.2d 720, 726 (Tenn. Crim. App. 1994). That is, "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979); *see* Tenn. R. App. P. 13(e). Because the standard of review and the body of evidence reviewed is identical for the defendant's contentions that the trial court erred in denying his motion for judgment of acquittal and that the convicting evidence was legally insufficient, we may dispose of both issues through the same analysis.

Of critical importance in the present case, this court, in determining the sufficiency of the evidence, should not reweigh or reevaluate the evidence, *State v. Matthews*, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990), and questions concerning the credibility of the witnesses, the weight

and value of the evidence, as well as all factual issues raised by the evidence are resolved by the trier of fact, not the appellate court, *State v. Cabbage*, 571 S.W.2d 832, 835 (Tenn. 1978). Also, this court may not substitute its inferences for those drawn by the trier of fact from the evidence. *Liakas v. State*, 286 S.W.2d 856, 859 (Tenn. 1956); *Farmer v. State*, 574 S.W.2d 49, 51 (Tenn. Crim. App. 1978). On the contrary, this court must afford the State of Tennessee the strongest legitimate view of the evidence contained in the record as well as all reasonable and legitimate inferences which may be drawn from the evidence. *Cabbage*, 571 S.W.2d at 835.

Moreover, a criminal offense may be established exclusively by circumstantial evidence, *Duchac v. State*, 505 S.W.2d 237 (Tenn. 1973); *State v. Winters*, 137 S.W.3d 641, 654 (Tenn. Crim. App. 2003); however, before an accused may be convicted of a criminal offense based upon circumstantial evidence alone, the facts and circumstances “must be so strong and cogent as to exclude every other reasonable hypothesis save the guilt of the defendant.” *State v. Crawford*, 470 S.W.2d 610, 612 (Tenn. 1971). “In other words, ‘[a] web of guilt must be woven around the defendant from which he cannot escape and from which facts and circumstances the jury could draw no other reasonable inference save the guilt of the defendant beyond a reasonable doubt.’” *State v. McAfee*, 737 S.W.2d 304, 306 (Tenn. Crim. App. 1987) (quoting *Crawford*, 470 S.W.2d at 613).

#### *A. Identity of Shooter*

The defendant challenges all of his convictions on the ground that “[t]he evidence of appellant’s identity as the shooter is insufficient to support the verdicts beyond a reasonable doubt.” The defendant argues that “[n]o forensic evidence, no evidence of any kind was discovered linking [the defendant] to the crime scene . . . one eyewitness who described someone other than the [defendant] is the only proof offered by the State against [the defendant].”

“[T]he question of identification of a defendant as the person who committed the offense is a question for the jury, and a victim’s identification alone is sufficient to support a conviction.” *State v. Toomes*, 191 S.W.3d 122 (Tenn. Crim. App. 2005) (citing *State v. Strickland*, 885 S.W.2d 85, 87 (Tenn. Crim. App. 1993)). Viewing the evidence in a light most favorable to the State, the jury heard sufficient evidence to identify the defendant as the shooter. Kent testified that he was familiar with the defendant from seeing him around the area and from speaking with him regarding a potential paint job for the defendant’s Monte Carlo. Although the defendant insists that the first time that Kent identified the defendant was during Detective Satterfield’s photographic lineup, the evidence shows that Kent identified “T” on other occasions. Kent testified that, immediately after the shooting on July 29, 2005, he told law enforcement officers that “T” was the shooter, and he called his friends stating the same. The defendant contends that Kent’s testimony is unreliable because he described the shooter as having tattoos, and the defendant does not have tattoos. The reliability and credibility of a witness is for the jury to determine, and in this case the jury accredited Kent’s eyewitness testimony that the defendant shot his brother. We will not disturb the jury’s findings.

Further, both Kent and Melissa testified that a “Taurus” or “Sable” pulled up to the body shop on July 29, 2005. Mr. Wester testified that the defendant drove a “green Taurus or Sable . . . whenever [he’d] seen him.” Detective Batty testified that he saw a “teal green” 1996 Mercury Sable at the defendant’s only reported address. Although the defendant presented testimony that the Sable was “undriveable” on July 29, the jury chose not to credit this testimony. The jury was within its province in considering the Sable as circumstantial evidence in convicting the defendant.

Because we find that the evidence was sufficient for the jury to identify the defendant as the shooter, we will not disturb the jury’s verdicts.

### *B. Premeditation*

The defendant challenges his conviction of premeditated first degree murder of Kirk. At the time of the offense, Tennessee Code Annotated section 39-13-202(a)(1) provided that “[f]irst degree murder is . . . [a] premeditated and intentional killing of another.” T.C.A. § 39-13-202(a)(1) (2003). “[P]remeditation’ is an act done after the exercise of reflection and judgment.” *Id.* § 39-13-202(d).

Proof of premeditation is inherently circumstantial. The trier of fact cannot speculate what was in the killer’s mind, so the existence of premeditation must be determined from the defendant’s conduct in light of the circumstances surrounding the crime. *See State v. Gann*, 251 S.W.3d 446, 455 (Tenn. Crim. App. 2007). Thus, in evaluating the sufficiency of proof of premeditation, the appellate court may look to the circumstances surrounding the killing. *See, e.g., State v. Bland*, 958 S.W.2d 651, 660 (Tenn. 1997); *State v. Coulter*, 67 S.W.3d 3, 72 (Tenn. Crim. App. 2001). Such circumstances may include “the use of a deadly weapon upon an unarmed victim; the particular cruelty of the killing; declarations by the defendant of an intent to kill; evidence of procurement of a weapon; preparations before the killing for concealment of the crime[;] and calmness immediately after the killing.” *Bland*, 958 S.W.2d at 660. The number of a murder victim’s wounds may be considered evidence of premeditation, *see State v. Nichols*, 24 S.W.3d 297, 302 (Tenn. 2000); however, the number of blows or wounds is not, in and of itself, sufficient circumstantial evidence upon which to draw an inference of premeditation. *See State v. Brown*, 836 S.W.2d 530, 543 (Tenn. 1992).

This court holds that sufficient evidence of premeditation was presented to the jury to support the defendant’s first degree murder conviction. Although the victim was found with a gun “underneath” his body, the evidence suggests that Kirk was using a car jack at the time that he was shot. Kirk was shot shortly after the three men arrived at the garage, and one of the men other than the defendant brandished a handgun, suggesting that the defendant and his companions came to the garage with violent intent. Kirk testified that the defendant wore a hood in an attempt to conceal his identity. The same person who shot Kirk also fired upon and wounded Melissa, and the second person shot Kent. Some evidence indicated that Kirk owed the defendant money, and other evidence suggested that other disputes had arisen between Kirk and the defendant. Immediately after the killing, the defendant fled the scene and then remained “at large” for four months. Doctor Turner

testified that Kirk was shot at least three times. Also, according to the defense witness Ms. Thompson, the defendant was “normal” and “just calm” less than an hour after the shooting. All these factors present ample evidence for a conviction of premeditated murder.

The defendant also challenges the sufficiency of his two convictions of attempted premeditated first degree murder of Melissa and Kent. Attempt, as relevant to the present case, occurs when a person, “acting with the kind of culpability otherwise required for the offense . . . [a]cts with the intent to cause a result that is an element of the offense, and believes the conduct will cause the result without further conduct on the person’s part.” T.C.A. § 39-12-101(a)(2).

The evidence showed that the defendant looked directly at Melissa and shot her in the chest even though Melissa was unarmed. Melissa testified that had she been “standing straight up [she would have] died.” As for Kent, he was shot twice, once in the arm and then again as he turned to run. Kent was also unarmed and, the fact that he was shot a second time in the back while fleeing shows premeditation. Although the defendant did not personally shoot Kent, the jury was within its province in holding the defendant criminally responsible for the attempted first degree murder of Kent. *See id.* § 39-11-402. On the record as a whole, the jury acted within its providence in finding the defendant guilty of both counts of attempted premeditated first degree murder.

## *II. Conclusion*

Because the evidence presented at trial was legally sufficient to support the jury’s verdicts, we affirm the judgments of the trial court.

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JAMES CURWOOD WITT, JR., JUDGE